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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

72-842

JAMES BRADLEY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

REPLY TO THE RESPONSE OF THE RESPONDENT

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• THIEL PRESS •

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Comes now the Petitioner, JAMES BRADLEY, by Counsel of Record, and files this his reply brief addressed to arguments first raised in the Response of the Respondent, pursuant to Rule 24(4)(5), of the Supreme Court, and in reply would respond as follows:

ADDITIONAL STATEMENT OF JURISDICTION

1. Without arguing the merits of the question of whether or not the First District Court of Appeals considered Petitioner's Motion for Re-hearing as timely filed, Petitioner asserts to the Court that leave to file a motion for rehearing was filed, and apparently the Appellate Court did consider the motion for rehearing but denied the same on the 17th day of October, A.D., 1972.

In support of Petitioner's claim of timely filing, the Petitioner would respectfully show unto the Court the following facts:

2. The Petition for Certiorari was duly filed with this Court on the 16th day of November, A.D., 1972.

3. A copy of said Petition was duly filed upon Respondent on November 16, 1972, by mail, receipt of which has been acknowledged by the Respondent as received on November 10, 1972.

4. That Petitioner had retained Thiel Press of Washington, D.C., to prepare the printed brief and to file the same with the Supreme Court on or before November 16, 1972.

5. Through inadvertance and misunderstanding between Counsel for Petitioner and Thiel Press, the filing fee of $100.00 was not paid at the time of filing, but was promptly paid upon notice to Counsel for Petitioner by the Clerk of the Supreme Court on December 1, 1972.

6. (a) The facts constituting this inadvertance and misunderstanding are as follows:

(b) The Petitioner, through his attorney of record, on November 10, 1972, by telephonic communication and confirmed by letter of the same date, received assurance from Thiel Press, 1422 "K" Street, N.W., Washington, D.C., that it would print and deliver to the

Supreme Court on or before November 16, 1972, 40 copies of Petitioner's Petition for Writ of Certiorari.

(c) That Counsel for Petitioner had never filed a Petition for Certiorari with the Supreme Court and inquired of Thiel Press as to the filing fee. That Thiel Press advised Mrs. Claire Tillotson, secretary to Counsel of Record, to deposit the sum of $150.00, and Thiel would be responsible for the filing of said Petition and bill Counsel for any overage.

(d) That on November 13, 1972, Counsel mailed Thiel Press a check in the amount of $150.00, as a cost deposit.

(e) On November 21, 1972, Thiel Press mailed its invoice #7154 in the amount of $169.06, which additional sum was promptly paid.

(f) Counsel did not realize that the filing fee had not been paid until notified by the Honorable Edward C. Shade, Assistant to Michael Rodak, Jr., Clerk of the Supreme Court on December 1, 1972.

(g) That Counsel received such notice by mail on Monday, December 4, 1972, and promptly, on the same date, mailed a check in the amount of $100.00 to the Clerk.

(h) Counsel does not suggest that Thiel Press was in any way negligent or breached any agreement with counsel for payment of the filing fee, but merely alleges that the non-timely payment was due to a misunderstanding on Counsel's part as to the manner of payment.

7. Upon receipt of the filing fee, the Petition was docketed on December 8, 1972, by this Court.

The Petitioner contends that the Petition was timely filed with the Court on November 16, 1972.

Petitioner can find no United States Supreme Court case where failure to pay the filing fee is a jurisdictional prerequisite under Rule 22; however, there is ample authority that Rule 22 is not jurisdictional, even as to time. See *Schacht v. United States*, 398 U.S. 58, 26 L.Ed. 2d 44; 90 S.Ct. 1555; also, *Heflin v. United States*, 258 U.S. 415, 3 L.Ed. 2d 407; 79 S.Ct. 451 (1959) and *Taglianetti v. United States*, 394 U.S. 316, 22 L.Ed. 2d 302; 89 S.Ct. 1099 (1969).

The Supreme Court of the State of Florida has held, in the case of *City of Gainesville v. Thomas*, 229 So.2d 833, that:

> "while timely filing of notice of appeal is jurisdictional, the timely deposit of the required filing fee is not."

We respectfully urge the Court to accept the Petition as timely filed.

II.

In response to the position taken by the Respondent under Reason II of its Reply, as to why the Writ should not issue, Counsel for the Petitioner takes issue with the statement that original counsel relied upon State Statutes and rules to support his right to a preliminary hearing.

1. In order for the Court to understand the issues raised by Petitioner, both before the Trial Court and the First District Court of Appeal of Florida, as to his right to a preliminary hearing, it is necessary to review the status of the law of Florida at the time the appeal was filed. Notice of Appeal was filed on June 11, 1971. The direct information charging Petitioner with the felony of buying, receiving or concealing stolen property was filed by the State Attorney for the Seventh Judicial Circuit of

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Florida on January 18, 1971. Petitioner was never taken before a Committing Magistrate for a determination of probable cause, reasonableness of bail, nor to be advised of his Constitutional rights as apparently required by Florida Criminal Procedural Rule 1.222. Florida Statute 902, having been repealed by the Florida State Legislature on January 1, 1971, and superseded by Criminal Procedural Rules adopted by the Florida Supreme Court, which provided that conflicting rules and statutes were suspended. The Preliminary Hearing provision of the Criminal Procedural Rule as to Preliminary Hearings was essentially the same language as the repealed Florida Statute 902.

At the time Petitioner was informed against, by direct information, the right to a Preliminary Hearing after the filing of a direct information and while the defendant was on bail, had not been directly decided by our State Supreme Court.

In attempting to come to legal grips with this right, the Fourth District Court of Appeal of Florida, on December 1, 1970, in the case of *State ex rel Shailer v. Booker*, 241 So.2d 720, the Court recognized the statutory right to a preliminary hearing but did not hold the same to be a procedural step essential to due process of law in State Courts. It suggested that if the right is not voluntarily accorded, a Writ of Mandamus would be the appropriate remedy.

Armed with *Shailer v. Booker*, but dissatisfied with its rejection of the procedural due process right, Petitioner claimed such a right at the trial court level in a pre-trial motion for a preliminary hearing based upon State and Federal Constitutional rights. This Motion upon Federal Constitutional rights was embodied under the 4th and 14th Amendments of the United States Constitution.

In his pre-trial motion for preliminary hearing filed before the trial court on February 8, 1971, the following Constitutional rights were claimed:

"5. That the failure or refusal of the State to grant James Bradley a preliminary hearing violates his rights guaranteed by the Constitution of the State of Florida, and the Constitution of the United States and the law promulgated thereunder, to-wit:

(a) The right to demand the nature and cause of the accusation against him;

(b) The right to meet the witnesses against him face to face;

(c) The right to have compulsory process for the attendance of witnesses on his behalf; all being necessary and required at any preliminary hearing wherein the major issues is probable cause for any accusation;

(d) The right to due process;

(e) The right to be represented by counsel at any and all "critical stages" of the criminal process so that potential substantial prejudice to the Defendant's rights might be avoided;

(f) The right to cross-examination of witnesses to expose any fatal weakness in the State's case that might;

(g) The right to a skilled interrogation of the witnesses which can fashion a fatal impeachment tool for use at the trial;

(h) The right to a more effective discovery technique which allows the Defendant to better prepare his defenses;

(i) The right to reasonable bail;

(j) The right to equal protection of the law.

6. That by virtue of the State's denial to the defendant of his right to a preliminary hearing his arrest is illegal and contrary to the Constitution and laws of the State of Florida, to-wit:

(a) The defendant was denied the right to be brought before a magistrate;

(b) The defendant was denied the right to be informed by a magistrate of the charge against him;

(c) The defendant was denied the right to be informed of his right to counsel by a magistrate;

(d) The defendant was denied his right to be informed of his right to waive the Preliminary Hearing."

To such Constitutional attack, the Trial Court held, on March 31, 1971:

"Ordered and Adjudged that the Defendant's Motion for Preliminary hearing be, and the same is hereby denied."

It is clearly demonstrated by the record that the Trial Court at the first opportunity, was given the right first to consider the applicability of State Criminal Procedural Rules in light of a Federal Constitutional challenge and chose to avoid the issue.

With the undisputed facts in the record, it is difficult to reconcile the respondent's statement to this Court that original Counsel relied upon State Statute and rules to support his claim of a Constitutional right to a preliminary hearing.

We respectfully suggest to the Court that Petitioner bottomed his argument before the Trial Court of a right to a preliminary hearing under the Fourth and Fourteenth Amendments to the Constitution of the United States, as the trial record clearly indicates.

It is interesting to note that the First District Court of Appeal's decision in *State ex rel Hardy v. Blount*, 261 So.2d, 172, decided by the Court on April 5, 1972, at a time prior to oral arguments in *Bradley*, rejected a right to a preliminary hearing based upon State statutory or

Florida Criminal Procedural Rule rights. A Federal Constitutional issue was not advanced in Hardy.

Faced with the Hardy decision, it hardly seems logical that counsel would abandon his Constitutional rights argument and rest his case upon State statutes and rules already decided by Hardy.

Indeed, the briefs and positions taken refuse such claim.

2. As to the Respondent's statement that not one single case cited by Petitioner's new attorney was presented to the District Court of Appeal, Counsel would respectfully show that *Pugh v. Rainwater*, 332 F. Supp. 1107 was cited, which contains the authorities relied upon by counsel in his Petition before this Court. In Pugh, Judge King, Federal Judge of the United States District Court, Southern District of Florida, specifically ruled upon the following Constitutional question:

CONSTITUTIONAL QUESTION

> "The principal Constitutional issue for determination is, of course, whether one who is arrested and held for trial upon an information filed by the state attorney is entitled to a hearing before a judicial officer on the question of probable cause."

The issue framed by counsel for Petitioner in his brief to the First District Court of Appeal under Point A was:

> "Whether or not a person arrested after an information has been filed against him has a right to a preliminary hearing, and if so, how may that right be enforced when the same is not voluntarily accorded to the arrested person."

Judge King answered the question upon Constitutional rights as follows:

"The Court finds under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the Constitutional right to a judicial hearing on the question of probable cause." *Pugh v. Rainwater*, 332 F. Supp. 1107.

The First District Court of Appeal answered essentially the same question as follows:

"The facts are that the Defendant was charged by information. The Supreme Court of Florida, as well as this Court, has held that a probable cause having been found by the filing of the information, the purpose of a preliminary hearing has been met."

In Counsel's brief to the First District Court of Appeal, counsel pointed out Judge King's findings that:

"A preliminary hearing is necessary for direct information cases by the 4th as well as the 14th Amendments to the Constitution of the United States."

3. Indeed, in the Petition for Rehearing before the First District Court of Appeal of Florida, whether timely filed or not, Counsel for Petitioner urged the Court reconsider the following Constitutional question as grounds for granting the same, to-wit:

"That the Appellate Court failed to consider the Constitutional right to a preliminary hearing as embodied under the 4th and 14th Amendments to the Constitution of the United States of America."

In view of the undisputed record of repeated attempts by Petitioner to raise Federal Constitutional rights at the trial and Appellate level, Respondent's claim that such issues are first raised in the Petition are totally without merit.

Ample opportunity was given to the State at the trial and Appellate level to decide the Federal Constitutional issues raised, but for reasons known only to the State, the Trial and Appellate Courts avoided such issues and decided the rights on existing State laws in violation of Petitioner's Federal Constitutional Rights.

CONCLUSION

WHEREFORE, Petitioner respectfully moves this Court to issue its Most Gracious Writ of Certiorari.

Respectfully submitted,

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